Arbitrating in Mauritius

by Abdul Jinadu

Mauritius is positioned in a geographic "sweet spot" between Africa and Asia and it sees itself as providing a gateway for investment into Africa from the Far East, the Middle East, the Indian sub-continent and also from Europe. Abdul Jinadu discusses arbitration in Mauritius from the perspective of counsel.

Given the explosion of arbitral centres in Africa in recent years (Kigali, Lagos, Nairobi and now potentially centres in South Africa opening up with the imminent passage of the new International Arbitration Act), Mauritius has faced, and will continue to face, stiff completion as it seeks to establish itself as the preeminent destination for arbitrations on the continent.

There are two fundamental areas where Mauritius has an advantage over most of its competitors. The first is practical. Mauritius has a well developed infrastructure which makes it attractive as a venue for arbitration. Mauritius also has excellent hotels and conference centres which serve as excellent venues for arbitrations, and good secretarial support is available. In addition, there are good transport links with Dubai, Nairobi and Johannesburg less than 5 hours away by air and multiple flights a day are available to all of the major hubs. Equally important is that Mauritius offers good security.

The second fundamental advantage that Mauritius has is a system of law which is fully supportive of international arbitration and which goes out of its way to attract international arbitration to the island.

Basics of Mauritian Arbitral System[1]

Mauritian law is a hybrid system of law, which draws its inspiration from France and from England. The Mauritian International Arbitration Act 2008 ("the IAA") was promulgated by the Parliament of Mauritius on 25 November 2008, and came into force on 1 January 2009. The IAA is based on the UNCITRAL Model Law as amended in 2006. Following a review of the performance of the IAA in the years following its promulgation, it was amended with effect from 1 June 2013 by the International Arbitration (Miscellaneous Provisions) Act 2013 ("IA(MP)A").

Other important legislative provisions include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 (as amended in 2013) (the "New York Convention Act") and the Supreme Court (International Arbitration Claims) Rules 2013 (the "Rules of Court").

The IAA is the cornerstone of an extensive programme which has seen the establishment of a permanent branch of the Permanent Court of Arbitration of The Hague ("the PCA") in Mauritius, and the launch of the LCIA-MIAC Arbitration Centre, an independent arbitral institution founded in cooperation with the London Court of International Arbitration.

The IAA establishes two distinct and entirely separate regimes for domestic arbitration and for international arbitration. It covers only the latter.

The IAA is based on the UNCITRAL Model Law on International Commercial Arbitration as amended by UNCITRAL in 2006 ("the Amended Model Law"), as expressed by the UNCITRAL Secretariat in 1985. The provisions of the Amended Model Law have been incorporated within the IAA itself (rather than in a separate schedule). In order to assist international users, a Schedule (The Third Schedule to the IAA) has been prepared setting out where given Articles of the Model Law have been incorporated in the IAA.

The IAA provides that all Court applications under the IAA are to be made to a panel of three judges of the Supreme Court, with a direct and automatic right of appeal to the Privy Council. This is designed to provide international users with the reassurance that Court applications relating to their arbitrations will be heard and disposed of swiftly, and by eminently qualified jurists. Section 42(1A) of the IAA allows a single Judge of the Supreme Court, sitting in Chambers, to make an order for interim measures in the first instance, but the application is returnable before a panel of three Judges. The Supreme Court has published Supreme Court (International

1 Based on the on the Mauritian International Arbitration Act Handbook

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Arbitration Claims) Rules 2013 ("the Rules") for arbitration business. Each of the three Supreme Court Judges must be one of six specialist "Designated Judges" who will hear all matters under the IAA and for enforcement of international arbitral awards, and who receive specific training in the field of international arbitration.

Importantly, and in a significant departure from the rules usually prevailing in court proceedings in Mauritius, the Rules expressly provide for a general rule (subject to adaptation by the Court) that the losing party in an arbitration claim shall pay the actual (i.e. not nominal) legal costs of the prevailing party.

The IAA adopts a unique solution in that the vast majority of the functions which would traditionally have necessitated court assistance and, in particular, all appointing functions (and the ultimate rulings on challenges to arbitrators) under the IAA are given to the Permanent Court of Arbitration at The Hague (the "PCA"). Further, in order to ensure that the PCA is able to react swiftly in all Mauritian arbitrations, the Government has negotiated and concluded a Host Country Agreement with the PCA pursuant to which the PCA appoints a permanent representative to Mauritius, funded by the Government, whose tasks consist inter alia of assisting the Secretary-General of the PCA in the discharge of all his functions under the IAA, and of promoting Mauritius as an arbitral jurisdiction within the region and beyond.

In order to avoid satellite litigation and delays, all the decisions of the PCA are final and cannot be appealed or challenged in any way. A party which considers itself to have been wronged by a decision of the PCA cannot challenge it, be it before the national courts or in any other way; the only possible remedy being a challenge to any award rendered subsequently by the arbitral tribunal on the ground that the decision of the PCA has given rise to one of the grounds of annulment set out in section 39 of the IAA (equivalent to article 34 of the Model Law). For example, if the PCA has appointed an arbitrator without paying proper regard to qualifications required of the arbitrator in the arbitration clause, the aggrieved party may seek to challenge the award on the ground that "the composition of the arbitral tribunal ... was not in accordance with the agreement of the parties". It cannot challenge the decision of the PCA itself.

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Specific measures have also been taken for the simplified incorporation of arbitration clauses into the memorandum and articles of association of Mauritian Global Business Licence (GBL) companies, in order to foster possible synergies between an established and major sector of activity (the financial services sector) and the development of international arbitration in Mauritius. The provisions relating to incorporation of arbitration clauses into the Constitutions of these companies were simplified and clarified by the amendments made by the IA(MP)A in 2013.

In order to facilitate the reading of the IAA for international users, a schedule was created (the third Schedule to the IAA), which states in which articles of the IAA the various articles of the Model Law have been incorporated. The IAA makes specific provision to allow shareholders of GBL companies to include an arbitration clause in the constitution of the company providing that any dispute arising out of the constitution of the company shall be referred to arbitration under the IAA.

The aim of subsection 3(6) of the IAA was to provide an option to the shareholders of GBL companies to arbitrate their disputes under the constitution of the company in circumstances where the only forum for the resolution of such disputes had thenceforth been the Mauritian Courts.

In line with the Amended Model Law, the IAA does not link international arbitration in Mauritius with any given arbitral institution, or with any institutional rules. The aim of the IAA is to make Mauritius a favourable jurisdiction for all international commercial arbitrations, whether such arbitrations arise under ad hoc arbitration agreements, or under institutional rules such as those of the International Chamber of Commerce or the London Court of International Arbitration. In particular, foreign parties will only choose to arbitrate in Mauritius if they

can be guaranteed that their contractual wish to arbitrate – and not to litigate – their disputes will be respected, and that the Mauritian Courts will not intervene in the arbitral process, save to support that process and to ensure that the essential safeguards expressly provided for in the IAA are respected.

The IAA expressly clarifies that foreign lawyers are entitled to represent parties and to act as arbitrators in international commercial arbitrations in Mauritius.

This principle of non-intervention, save in extremely limited circumstances, is now one of the cardinal principles of international arbitration around the globe. Section 2A (formerly Section 3(8)) is of great importance. It enacts Article 5 of the Amended Model Law and enshrines the principle of noninterventionism.

Scheme of the IAA

Part I of the IAA sets out preliminary matters, including the usual provisions as to short title (i.e. the short title of the IAA) and interpretation (which sets out defined terms).

The main operative provisions defining the scope of application of the IAA are found in Part IA of the IAA. In addition to the provisions contained in the body of the IAA, parties have been given the choice of "opting into" one or more of the provisions set out in the First Schedule to the IAA. This "opt in" formula has been used for provisions (in effect determinations of preliminary points of Mauritius law, appeals on points of Mauritius law, consolidation, and joinder) which certain parties may consider as useful for their arbitrations, but which are too controversial for inclusion into the "normal regime" for international arbitrations in Mauritius without the express prior agreement of the relevant parties. It is for the parties to select which, if any, of the provisions of the First Schedule they wish to opt into.

Part II of the IAA contains the provisions relating to the initiation of arbitral proceedings and general provisions relating to the arbitration agreement, the seat of the arbitration, and consumer protection.

Part III of the IAA contains the provisions relating to the arbitral tribunal including appointments of, and challenges to, arbitrators, and the jurisdiction of the tribunal.

Part IV of the IAA contains the provisions relating to interim measures.

Part V of the IAA contains the provisions relating to the conduct of arbitral proceedings.

Part VI of the IAA contains the provisions relating to the Award, including applications for setting aside of awards and recognition and enforcement.

Part VII of the IAA contains miscellaneous provisions relating inter alia to the constitution of the Supreme Court for matters covered by the IAA, and appeals to the Privy Council.

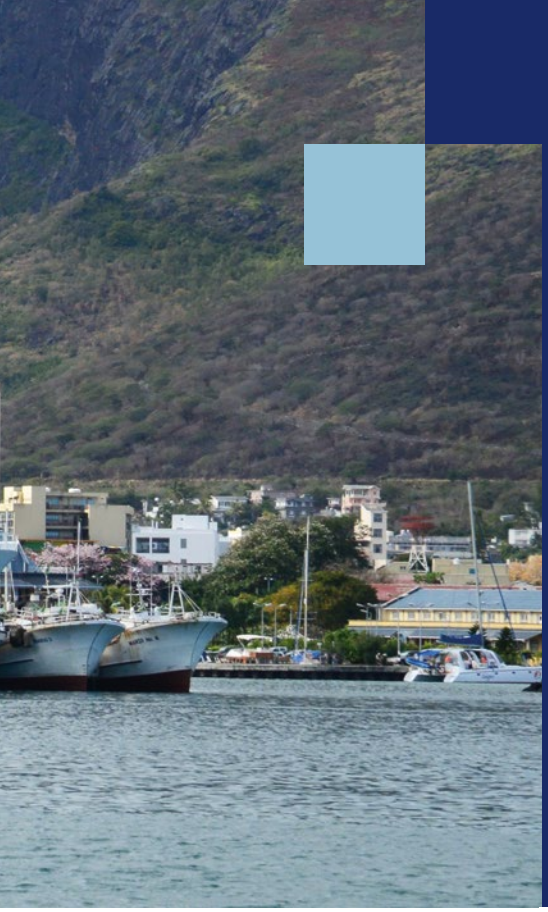
The First Schedule to the IAA sets out the specific provisions which parties are free to "opt into", as explained above.

The Second Schedule to the IAA sets out Model Arbitration Provisions for GBL Companies, the aim of which is to facilitate the adoption by GBL companies of arbitration agreements in their constitutions. The Third Schedule to the IAA contains a table showing the corresponding provisions of the IAA and of the Amended Model Law.

The New York Convention is already part of Mauritius law, having been enacted through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 2001 ("the New York Convention Act"). Section 43 makes a number of consequential amendments to that Act.

LCIA/MIAC

In July 2011, the Government of the Republic of Mauritius, the LCIA and the Mauritius International Arbitration Centre Limited (MIAC) entered into an agreement for the establishment and operation of a new arbitration centre in Mauritius, to be known as the LCIA-MIAC Arbitration Centre.



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Adopted to take effect for arbitrations commencing on or after 1 October 2012, the LCIA-MIAC Arbitration Rules provide that:

> *"Where any agreement, submission or reference provides in writing and in whatsoever manner for arbitration under the rules of the LCIA-MIAC Arbitration Centre ("LCIA-MIAC"), or by LCIA-MIAC, the parties shall be taken to have agreed in writing that the arbitration shall be conducted in accordance with the following rules (the "LCIA-MIAC Rules") or such amended rules as LCIA-MIAC and the Court of the LCIA (the "LCIA Court") may have adopted hereafter to take effect before the commencement of the arbitration (the "Arbitration Agreement")."*

Conclusion

The prospect of South Africa updating its international arbitration legislation in the very near future and making a serious attempt to attract international arbitration business has the potential of changing the landscape in respect of African arbitration. However, Mauritius has a number of advantages which should allow it to achieve its aim of becoming one of the principal arbitration centres serving African disputes